137 (1)

No. 09-46

Supreme Court, U.S.
FILED
AUG 12 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES OF AMERICA
EX REL. LOKESH VUYYURU,
Petitioner,

v.

GOPINATH JADHAV, M.D.; SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LIMITED; COLUMBIA/HCA JOHN RANDOLPH, INCORPORATED; PETERSBURG HOSPITAL COMPANY, LLC; THE CAMERON FOUNDATION, A VIRGINIA NON-PROFIT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. William Boland
Counsel of Record
E. Duncan Getchell, Jr.
Jeremy S. Byrum
Nathan A. Kottkamp
MCGUIREWOODS LLP
901 East Cary Street
Richmond, VA 23219
(804) 775-1000
Counsel for Respondent Columbia/HCA John Randolph, Inc.

Michael R. Shebelskie
Counsel of Record
Rita Davis
HUNTON & WILLIAMS, LLP
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200
Counsel for Respondents Petersburg Hospital Company, LLC & The Cameron Foundation

Martin A. Donlan, Jr.
Counsel of Record
W. Benjamin Pace
WILLIAMS MULLEN
Post Office Box 1320
Richmond, VA 23218-1320
(804) 643-1991
Counsel for Respondents Gopinath Jadhav, M.D. & Southside Gastroenterology Associates, Ltd.

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Did the court of appeals err in ruling that the district court did not commit clear error in finding that Petitioner's False Claims Act claims were "based upon" publicly disclosed allegations or transactions under 31 U.S.C. § 3730(e)(4)(A)?

2. Did the court of appeals err in ruling that the district court did not abuse its discretion in finding that Petitioner's claims were "clearly frivolous" under 31 U.S.C. § 3730(d)(4)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Hercules Holding II, LLC, HCA Inc., Healthtrust, Inc. – The Hospital Company, Healthserv Acquisition, LLC, and HCA Health Services of Virginia, Inc. are the parent companies of Columbia/HCA John Randolph, Inc., and that no publicly held company owns 10% or more of its stock. Undersigned counsel further state that Community Health Systems, Inc., a publicly held company, owns one hundred percent of the stock of CHS/Community Health Systems, Inc., which in turn owns one hundred percent of the membership interests of Virginia Hospital Company LLC, which in turn owns the majority of the membership interests of Petersburg Hospital Company, LLC.

The Cameron Foundation and Southside Gastroenterology Associates, Ltd. have no parent companies, and no publicly held companies own 10% or more of their respective stock.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 13

I. THE FOURTH CIRCUIT APPLIED EXISTING CIRCUIT LAW TO THE PARTICULAR FACTS OF THIS CASE, GIVING RISE TO NO IMPORTANT QUESTION AND GIVING RISE TO NO CIRCUIT SPLIT 13

A. The Fourth Circuit Did Not Hold That Petitioner Had To Prove He Was The Source Of The *Virginia Times* Articles 14

B. This Case Is Not A Plausible Vehicle For Resolving The Circuit Split Identified By Petitioner Because He Lost On Factual Arguments Under The Minority View He Advocates And Would Lose Even More Decisively Under The Majority View 17

II. THE ATTORNEYS' FEES AWARD RAISES NO ISSUE OF UNIFORMITY OF FEDERAL LAW AND IS THEREFORE NOT CERTWORTHY 20

A. The Fourth Circuit Applied The Correct Rule Of Law 21

B. The Petition Seeks This Court's Review Of Factual Determinations, Which Does Not Merit A Writ Of *Certiorari* 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES **PAGE**

Daly v. Hill,
790 F.2d 1071 (4th Cir. 1986)..... 22

Easley v. Cromartie, 532 U.S. 234, 242 (2001)..... 14

Glaser v. Wound Care Consultants, Inc.,
570 F.3d 907 (7th Cir. 2009)..... 18

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,
321 U.S. 275 (1944)..... 24

N.L.R.B. v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 23

Rockwell Int'l Corp. v. United States,
549 U.S. 457 (2007)..... 15-17, 24

Rogers v. Missouri Pac. R. Co.,
352 U.S. 521 (1957)..... 23

Ross v. Moffitt,
417 U.S. 600 (1974)..... 23

Southern Power Co. v. North Carolina Public Service Co.,
263 U.S. 508 (1924)..... 23

United States ex rel. Grynberg v. Praxair, Inc.,
389 F.3d 1038 (10th Cir. 2004)..... 21

United States ex rel. Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25 (D.D.C. 2007) 20

United States ex rel. J. Cooper & Assoc., Inc. v. Bernard Hodes Group, Inc., 422 F. Supp. 2d 225 (D.D.C. 2006) 22

United States ex rel. Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001) 21

United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir. 1994) ..... *passim*

United States ex rel. Vuyyuru v. Jadhav, 555 F.3d 337 (4th Cir. 2009) 1

United States ex rel. Vuyyuru v. Jadhav, Civil Action No. 3:06-cv-180, 2007 WL 951851 (E.D. Va. Mar. 28, 2007) 1

United States v. Johnston, 268 U.S. 220 (1925) 23

Vuyyuru v. Hardy, et al., Civil Action No. 3:06cv179 (E.D. Va. filed Mar. 13, 2006) 2

Vuyyuru v. Jadhav et al., Civil Action No. 3:09cv149 (E.D. Va. filed Mar. 16, 2009) 3

Vuyyuru v. Virginia Board of Medicine, Record No. 0610-07-2, 2008 WL 122804, (Va. App. Jan. 15, 2008) 1-2

Vuyyuru v. The Virginia Medical Board et al., Civil Action No. 3:08cv301 (E.D. Va. filed May 19, 2008) 3

STATUTES

31 U.S.C. § 3730(b)(2) 5

31 U.S.C. § 3730(d)(4) 10, 21

31 U.S.C. § 3730(e)(4)(A) ..... *passim*

31 U.S.C. § 3730(e)(4)(B) 16

OTHER AUTHORITIES

Sup. Ct. R. 10 ..... 20, 24

OPINIONS BELOW

This is an opposition to a petition for a writ of *certiorari* from an opinion entered February 12, 2009 by the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the Eastern District of Virginia and dismissing Petitioner's Third Amended Complaint ("Complaint") for lack of subject matter jurisdiction. That opinion is reported at *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337 (4th Cir. 2009) and is included in Petitioner's Appendix A. The opinions issued by the district court are unpublished, but are electronically reported at *United States ex rel. Vuyyuru v. Jadhav*, Civil Action No. 3:06-cv-180, 2007 WL 951851 (E.D. Va. March 28, 2007) and *United States ex rel. Vuyyuru v. Jadhav*, Civil Action No. 3:06-cv-180, 2007 WL 2471087 (E.D. Va. August 27, 2007). The district court opinions are included in Petitioner's Appendices B and C.

STATEMENT OF THE CASE

A. BACKGROUND

Petitioner Lokesh Vuyyuru is a gastroenterologist whose license to practice medicine was revoked by the Virginia State Board of Medicine (the "Board"). The Board summarily suspended Petitioner's license in 2005 "based upon its finding that his continued practice of medicine could be a substantial danger to the public health and safety . . . ." *Vuyyuru v. Virginia Board of Medicine*, Record No. 0610-07-2, 2008 WL 122804, *1 (Va. App. Jan. 15, 2008). The following year, the Board

permanently revoked Petitioner's license finding, among other things, that his "misconduct led to the performance of unnecessary medical procedures, physical harm to patients and, in one case, a patient's death." *Id.*

In retaliation, Petitioner commenced a series of lawsuits in the district court below against everyone involved in his disciplinary proceedings:

- He filed a $25 million conspiracy lawsuit against two Board investigators, alleging they conspired for the (alternatively imagined) purposes "to hinder his efforts to present evidence to a grand jury and to silence his criticism of the Virginia Board of Medicine and, Dr. Jadhav, or Southside Regional Medical Center or John Randolph Community Center and other powerful and/or influential individuals." *Vuyyuru v. Hardy, et al.*, Civil Action No. 3:06cv179 (E.D. Va. filed Mar. 13, 2006), at Complaint ¶ 22. The district court ultimately dismissed this lawsuit pursuant to the *Younger* doctrine. Order (Nov. 16, 2006).

- He filed a § 1983 lawsuit against the Board, its members, including Respondent Dr. Jadhav, two former Attorneys General of the Commonwealth of Virginia, six attorneys in the Office of the Attorney General and a host of Board personnel, including the two investigators.

Vuyyuru v. The Virginia Medical Board et al., Civil Action No. 3:08cv301 (E.D. Va. filed May 19, 2008). The district court dismissed this lawsuit, finding it "a rambling and largely-incoherent recitation of unclear allegations" that comprise "a confusing amalgamation of vague assertions against the [Board] and certain other defendants." Memorandum Order (Oct. 31, 2008) at 1, 3.

- He filed yet another lawsuit against Respondents Dr. Jadhav and his practice group, Southside Gastroenterology Assocs., Ltd., seeking $95 million. This lawsuit also names 35 additional defendants including witnesses who testified at one of the peer review disciplinary proceedings, the hearing officers for that proceeding, as well as counsel involved in the proceeding. *Vuyyuru v. Jadhav et al.*, Civil Action No. 3:09cv149 (E.D. Va. filed Mar. 16, 2009). Petitioner's counsel in that lawsuit recently advised the district court that she is conducting a "Rule 11 review" to ascertain the "basis in law or fact" for Petitioner's claims and conceded that the complaint "may require substantial amendments." Plaintiff's Memorandum in Support of Motion to Extend Time to Serve Defendants (filed July 14, 2009) at 2, 3.

This lawsuit is part and parcel of that campaign of harassment. In addition to Dr. Jadhav, against whom this is Petitioner's third lawsuit, Respondents include the entities that operate two hospitals, Southside Regional Medical Center ("SRMC") and John Randolph Medical Center ("JRMC"). Petitioner's privileges to practice were revoked at SRMC, and suspended at JRMC prior to the suspension and eventual revocation of his medical license.

B. The *Virginia Times* Articles

In March 2005, a year before Petitioner filed this lawsuit, the *Virginia Times* newspaper published a front-page article titled "Alleged insurance, quality-of-care fraud at SRMC." Authored by staff writer Dorothy Rowley, the article asserted that Respondent Dr. Jadhav engaged in Medicare and Medicaid fraud at SRMC by unnecessarily performing certain medical procedures. The article cited "[n]ursing sources who worked with Jadhav"—not Petitioner—as the source for its assertions. The *Virginia Times* thereafter published in 2005 several other articles alleging fraudulent Medicare and Medicaid billing by Dr. Jadhav, SRMC and JRMC.

C. The Complaint And Petitioner's Original Declaration

Petitioner commenced this suit the following year in March 2006. His Complaint repeated the allegations in the *Virginia Times* articles and sought to allege on behalf of the United States three counts

under the False Claims Act (the "FCA") predicated on alleged unnecessary medical procedures by Dr. Jadhav. The Government declined to participate in the suit.

The Complaint did not identify any specific false statements or bills that Respondents made or submitted to the United States. Nor did the Complaint allege that Petitioner had direct and independent knowledge of Respondents' billings. The Complaint alleged instead that Petitioner "learned" that through "March of 2005," Dr. Jadhav performed certain medical procedures unnecessarily. The Complaint then speculated "[u]pon information and belief"—without providing the basis for such belief—that Respondents billed the United States for unnecessary procedures.

Petitioner amended and restated his Complaint three times. None of those amendments altered the conclusory nature of Petitioner's FCA claims. None identified any actual fraudulent billings by Respondents. None alleged that Petitioner had direct and independent knowledge of Respondents' billings.

Petitioner's statement of supporting information that accompanied the Complaint was conclusory as well. The FCA requires prospective relators to provide the Government "all material evidence and information related to the complaint." 31 U.S.C. § 3730(b)(2). Petitioner filed with his Complaint a declaration (the "First Declaration") to satisfy that requirement. Absent from the First Declaration were any bills or statements from

Respondents. The First Declaration was limited instead to partial medical records for several patients and a handful of articles that Petitioner claims showed that those persons received unnecessary procedures.

D. Respondents' Motions To Dismiss

Respondents moved to dismiss the FCA claims on various grounds including lack of subject matter jurisdiction. Respondents argued that the district court lacked subject matter jurisdiction over the FCA claims pursuant to 31 U.S.C. § 3730(e)(4)(A) because those claims were "based upon" the *Virginia Times* articles and Petitioner was not an "original source."

Attached to the memorandum in support of the motions to dismiss were copies of the *Virginia Times* articles. Also attached was a copy of Petitioner's deposition testimony in a defamation lawsuit arising from *Virginia Times* articles. When asked in that deposition whether he was the source for articles in the paper, Petitioner stated "No . . . . [the reporters] publish these articles talking to various people . . . ."

E. Petitioner's Opposition To The Motions To Dismiss

Petitioner's brief in opposition to the motions to dismiss did not contest that his FCA claims were based upon the *Virginia Times* articles. Petitioner argued instead that he qualified as an "original source" because he possessed direct and independent

knowledge of Respondents' alleged false billings. Petitioner's brief, however, stated no facts substantiating that assertion. Petitioner's brief proffered various bases for Petitioner's belief that Dr. Jadhav performed unnecessary medical procedures, but it was silent about a necessary predicate for the FCA claims—namely, the submittal of false claims or statements to the Government for those procedures.

The declaration that Petitioner provided with his opposition brief (the "Second Declaration") was likewise devoid of such substantiation. The Second Declaration asserted in vague terms that Petitioner spoke with the FBI and several Assistant United States Attorneys regarding "improper medical procedures . . . and billing fraud at both SRMC and JRMC" prior to 2005. The Second Declaration, however, did not identify specific bills or statements by Respondents that were fraudulent. Nor did it aver that Petitioner had direct and independent knowledge of Respondents' billings.

F. The District Court's Hearing On The Motions To Dismiss

The district court heard argument on the motions to dismiss on January 26, 2007, nearly four months after the motions were filed. Only moments before the hearing, Petitioner served on Respondents and filed with the district court another declaration (the "Third Declaration"). The district court struck the Third Declaration as untimely—a ruling Petitioner did not challenge on appeal—but the Third Declaration did not cure the deficiencies in

Petitioner's proof in any event. It identified no actual fraudulent billings by Respondents. Nor did it substantiate or even aver that Petitioner had direct and independent knowledge of Respondents' billings.

During the hearing—as in his brief—Petitioner did not challenge that his FCA claims were "based upon" the *Virginia Times* articles and focused instead on whether he had direct and independent knowledge of Respondents' allegedly false billings to the Government and was thus an "original source." His counsel acknowledged at the hearing, however, that Petitioner lacked any knowledge or evidence of actual fraudulent bills submitted by Respondents. All Petitioner proffered was that he believed Dr. Jadhav performed unnecessary or inadequate procedures, but he could not bridge the gap necessary for a FCA claim. He could not correlate any allegedly fraudulent bills with any of Dr. Jadhav's allegedly improper procedures.

G. The District Court's Opinion

On March 28, 2007, the district court held that it lacked subject matter jurisdiction over the FCA claims. Applying Fourth Circuit precedent, the district court found that the FCA claims were "actually derived from" the *Virginia Times* articles. In making this finding, the district court considered the significant similarities between those articles and Petitioner's allegations. The district court did not limit its consideration to those similarities, however. The district court also considered that

notwithstanding multiple amendments to his Complaint and multiple declarations, Petitioner provided no evidence establishing a source for his allegations of false billing to the Government. As the district court found, Petitioner "could not offer any evidence, other than a post hoc conclusory affidavit stating that he complained about the defendant Dr. Jadhav to the FBI prior to the *Virginia Times* articles, that would allow the Court to adopt his position." (Opinion at 74a, Petitioner's Appendix C.)

The district court further found that Petitioner had not carried his burden of demonstrating that he was an "original source" of the FCA claims—that is, that he had direct and independent knowledge of the allegedly false billings to the Government. The district court found that despite "filing four different iterations of a complaint," Petitioner: (a) "consistently has failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the [Complaint];" (b) "does not provide specific facts about the *allegations* in the [Complaint];" and (c) "has not provided any correlation between the fraudulent billing that he alleges occurred" at SRMC and JRMC and "the fraudulent practices that he alleges defendant Dr. Jadhav engaged in." (Opinion at 76a-78a, Petitioner's Appendix C.)

H. The District Court's Award Of Attorneys' Fees

The Cameron Foundation (a charity established to receive and administer the proceeds

from the sale of SRMC by its prior owner) filed a motion for attorneys' fees pursuant to 31 U.S.C. § 3730(d)(4) following the district court's dismissal of the FCA claims. The motion sought fees on the grounds that the FCA claims were clearly frivolous and vexatious. The district court agreed that the FCA claims were clearly frivolous and awarded fees in the amount of $68,228.75. In doing so, the district court reiterated that Petitioner:

> 'failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the [Complaint],' failed to provide specific facts about his allegations so that the Court could determine that he was their original source, and failed to provide the 'necessary dates and details' to support his claim that fraudulent practices were occurring at John Randolph Medical Center and Southside Regional Medical Center.

(Opinion at 60a, Petitioner's Appendix B.)

Petitioner filed another declaration (the "Fourth Declaration") in connection with The Cameron Foundation's fee application. Although not considered by the district court in its ruling dismissing the FCA claims, the Fourth Declaration stated conclusorily that Petitioner had spoken with the "United States Attorney's General Office" and unnamed FBI agents. But like its predecessors, the Fourth Declaration identified no actual false bills or statements submitted by Respondents. The Fourth Declaration also did not aver that Petitioner had

direct and independent knowledge of Respondents' billings, much less provide facts on which any such assertion could rest.

Attached to the Fourth Declaration was a letter from the Department of Justice that Petitioner contends substantiates his position. The letter, however, is merely an offer of limited use immunity in exchange for a proffer by Petitioner. The letter makes no mention of false claims. Nor does the letter reveal whether Petitioner accepted the offer, whether he made a proffer, the content of any such proffer (if he made one), and whether he had direct and independent knowledge of anything he may have proffered.

Petitioner thereafter tendered another declaration (the "Fifth Declaration"). The Fifth Declaration attempted to introduce information from the disallowed Third Declaration. The district court struck the Fifth Declaration, a ruling not challenged on appeal.

I. Petitioner's Appeal To The Fourth Circuit

Petitioner appealed both the dismissal order and the award of attorneys' fees. Though he had not argued this before the district court, Petitioner argued before the Fourth Circuit that his FCA claims were not "based upon" the *Virginia Times* articles. Even then, Petitioner did not argue that the district court applied the wrong standard in construing the "based upon" requirement. Petitioner instead took issue with the district court's view of

the facts. Specifically, Petitioner objected to the conclusions the district court drew in finding that the FCA's claims were "actually derived from" the *Virginia Times* articles.

On February 12, 2009, the Fourth Circuit issued an opinion affirming the district court's decision on all issues. (*See* Opinion at 3a, Petitioner's Appendix A.) Applying a clearly erroneous standard, with which Petitioner does not take issue, the Fourth Circuit affirmed the district court's findings of fact that:

- The FCA claims were "actually derived" from "the public disclosure of allegations from the news media." (Opinion at 29a, Petitioner's Appendix A.); and

- Petitioner did not prove that he had direct and independent knowledge of the allegations of fraudulent billings. (Opinion at 37a, Petitioner's Appendix A.)

The appellate court reasoned that the district court's findings on those matters were not clearly erroneous in light of numerous considerations, including: the substantial similarity between the *Virginia Times* articles and Petitioner's Complaint; Petitioner's denial in sworn testimony that he was a source of articles in the *Virginia Times*; Petitioner's inability to specify a single false claim or statement; and, Petitioner's repeated failure to explain how he had direct and independent knowledge of

Respondents' billings. (Opinion at 25a-37a, Petitioner's Appendix A.)

The Fourth Circuit also affirmed the attorneys' fee award to The Cameron Foundation. (Opinion at 37a, Petitioner's Appendix A.) The appellate court held, based on the evidence in the record, that the district court did not abuse its discretion in finding as clearly frivolous Petitioner's claim that he was a proper relator. (Opinion at 40a, Petitioner's Appendix A.) The appellate court also affirmed the amount of the award, a ruling Petitioner does not challenge here. (Opinion at 42a, Petitioner's Appendix A.)

Petitioner moved for reconsideration and rehearing *en banc*. The Fourth Circuit denied those petitions. (Orders at 83a, 86a, Petitioner's Appendices D and E.)

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT APPLIED EXISTING CIRCUIT LAW TO THE PARTICULAR FACTS OF THIS CASE, GIVING RISE TO NO IMPORTANT QUESTION AND GIVING RISE TO NO CIRCUIT SPLIT

In the first and second assignments of error, Petitioner contends that the FCA's public disclosure bar was not triggered by the *Virginia Times* articles because the evidence did not show that his FCA claims were "based upon" the articles. *See* 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction over

an action under this section *based upon* the public disclosure of allegations or transactions. . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.") (emphasis added). The Fourth Circuit reviewed the district court's jurisdictional findings of fact under the clearly erroneous standard of review. (Opinion at 25a, Petitioner's Appendix A.) (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). After reviewing all of the evidence, the Fourth Circuit determined that the district court did not commit clear error in holding that the FCA claims were "based upon" the allegations in the *Virginia Times*. The only question properly before this Court, therefore, is the non-certworthy one of whether the district court committed clear error in its jurisdictional findings of fact. Petitioner asserts no error in those findings that warrants this Court's review.

A. The Fourth Circuit Did Not Hold That Petitioner Had To Prove He Was The Source Of The *Virginia Times* Articles

In his first assignment of error, Petitioner complains that the Fourth Circuit required him to produce evidence that he was the source of the allegations in the *Virginia Times* to avoid application of the public disclosure bar. Petitioner argues that the Fourth Circuit held that a *qui tam* relator must prove that he is the source of a public disclosure to show that his Complaint is not "based upon" publicly disclosed allegations. Based on this alleged holding, Petitioner argues that the Fourth

Circuit's ruling conflicts with the Supreme Court's holding in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). Petitioner misreads the Fourth Circuit's opinion.

The Fourth Circuit did not hold that Petitioner had to prove that he was the source of the *Virginia Times* articles to show that his FCA claims were not "based upon" public disclosures. To the contrary, the Fourth Circuit followed long-standing circuit precedent, and held that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." (Opinion at 26a, Petitioner's Appendix A.) (quoting *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994)). This is the precise substantive standard Petitioner advocates.

The portion of the Fourth Circuit's opinion to which Petitioner points is not an articulation of the applicable standard, but a comment on Petitioner's argument. Petitioner invited the Fourth Circuit's discussion of whether he was the source of the *Virginia Times* articles by arguing on brief that the district court erred in applying the "derived from" standard in *Siller* because Petitioner might have been the source of the articles. (Opening Brief of Appellant/Petitioner in the United States Court of Appeals for the Fourth Circuit ("Opening Brief") at 32-33.) In response to that suggestion, the Fourth Circuit observed that it was Petitioner's burden to prove "the necessary jurisdictional facts" and questioned why, as a manner of carrying that

burden, he "did not simply offer his own sworn statement to the district court unequivocally stating that he was the primary source for the *Virginia Times* Article," despite his previous testimony to the contrary. (Opinion at 28a, Petitioner's Appendix A.) In making that observation, the Fourth Circuit never held that Petitioner failed to satisfy his burden of proof because he did not show that he was the source of the articles.

Additionally, the Fourth Circuit's opinion does not conflict with the Supreme Court's decision in *Rockwell*. *Rockwell* addressed the "original source" analysis under 31 U.S.C. § 3730(e)(4)(B), not the "based upon" analysis under 31 U.S.C. § 3730(e)(4)(A), and thus the holding in *Rockwell* has little or no relevance here. *See Rockwell*, 549 U.S. at 470-72; 31 U.S.C. § 3730(e)(4)(B) ("'[O]riginal source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."). The question in *Rockwell* was whether "the phrase 'information on which the allegations are based' refer[s] to the information on which the relator's allegations are based or the information on which the publicly disclosed allegations that triggered the public-disclosure bar are based." *Rockwell*, 549 U.S. at 470. The Court held that it was the former. *Id.* at 470-71.

The Fourth Circuit's opinion in this case is in perfect harmony with *Rockwell*. (*See* Opinion at 22a, Petitioner's Appendix A (citing *Rockwell*, 549 U.S. at

471-72).) The Fourth Circuit did not hold that Petitioner had to have direct and independent knowledge of the information on which the *Virginia Times* articles were based to prove that he was an "original source." Even a cursory review of the Fourth Circuit's opinion reveals that the court's "original source" analysis examined whether Petitioner had direct and independent knowledge of the allegations in the Complaint, not the *Virginia Times* articles. (*See* Opinion at 31a-34a, Petitioner's Appendix A.)

B. This Case Is Not A Plausible Vehicle For Resolving The Circuit Split Identified By Petitioner Because He Lost On Factual Arguments Under The Minority View He Advocates And Would Lose Even More Decisively Under The Majority View

In Petitioner's second assignment of error, he argues that the Fourth Circuit departed from its holding in *Siller* that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Siller*, 21 F.3d at 1348. That assignment too misreads the Fourth Circuit's opinion below.

In upholding the dismissal of Petitioner's FCA claims, the Fourth Circuit expressly followed its holding in *Siller*, reviewing for clear error "the district court's finding that the allegations of the Third Amended Complaint pertaining to the FCA

claims were based upon, *i.e.*, actually derived from, the *Virginia Times* articles." (Opinion at 26a, Petitioner's Appendix A.) The majority and the dissent disagreed not with respect to whether *Siller* controlled, but only as to whether the district court committed clear error in making its jurisdictional findings. (*See* Opinion at 47a, Petitioner's Appendix A (Reidinger, J., dissenting).)

Moreover, this matter is not an appropriate occasion to resolve the circuit split referenced by Petitioner (Petition at 14-15), because the Fourth Circuit's holding would be proper under either outcome. The majority of circuits have rejected the "derived from" interpretation articulated in *Siller*, and have instead held that "a relator's FCA complaint is 'based upon' publicly disclosed allegations or transactions when the allegations in the relator's complaint are substantially similar to publicly disclosed allegations." *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 914-20 (7th Cir. 2009) (discussing circuit split and collecting cases). Petitioner argues for application of the minority interpretation of "based upon" that the Fourth Circuit followed in the opinion below, which he did not satisfy. Application of the majority interpretation would be even less favorable to Petitioner. It is indisputable that the allegations in the Complaint were substantially similar to the allegations in the *Virginia Times*, and, thus, would be sufficient to trigger the public disclosure bar under the majority interpretation of 31 U.S.C. § 3730(e)(4)(A). The issue presented by Petitioner is whether the Fourth Circuit misapplied its own minority standard in holding that the district court

did not commit clear error. That is not a proper case in which to address a circuit split.

Petitioner also misapprehends the Fourth Circuit's opinion in suggesting that the court held the similarity between the FCA allegations in the Complaint and the *Virginia Times* articles was sufficient to trigger the public disclosure bar. The Fourth Circuit cited a number of factors, in addition to the similarities between the allegations, that supported a finding that the FCA claims were actually derived from the *Virginia Times* articles: (1) the articles preceded the filing of the *qui tam* action by nearly a year; (2) Petitioner denied under oath in a deposition that he was the source of the articles; and (3) Petitioner offered no evidence that he was the source of the articles. (Opinion at 26a-27a, Petitioner's Appendix A.) It was not simply the similarity of the allegations, but the proximity of Petitioner to the public disclosures and the absence of proof of an alternative explanation that constituted "significant proof" that the *qui tam* action was actually derived from the *Virginia Times* articles.

Petitioner theorizes that he could have obtained his information from the same or different sources than those used by the *Virginia Times* reporter (Petition at 14), but disregards the fact that he had the burden of proof with respect to all necessary jurisdictional facts. (Opinion at 28a, Petitioner's Appendix A.) Petitioner offered no evidence to rebut the clear inference that he had

derived his *qui tam* Complaint from the allegations published in the *Virginia Times*.[1]

According to this Court's Rule 10, "[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Petitioner's first two assignments of error boil down to claims that the district court committed clear error in making jurisdictional factual findings and that the Fourth Circuit misapplied the properly stated standard in *Siller*. As such, Petitioner fails to provide any of the "compelling reasons" that justify a writ of *certiorari*. This case falls within the broad heartland of cases for which a petition for writ of *certiorari* should be rejected.

II. THE ATTORNEYS' FEES AWARD RAISES NO ISSUE OF UNIFORMITY OF FEDERAL LAW AND IS THEREFORE NOT CERTWORTHY

---

[1] Having failed to present evidence to support his jurisdictional allegations, Petitioner argues that it should have been clear from the face of the Complaint that his allegations were not actually derived from the *Virginia Times* articles. Petitioner claims that the Complaint contained details not included in the *Virginia Times* articles. However, where "a relator merely adds slight details and variations to a publicly disclosed fraud," the relator's Complaint is nevertheless based upon the public disclosure for purposes of Section 3730(e)(4)(A). *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 50 (D.D.C. 2007).

Contrary to Petitioner's argument, there is nothing "extreme" about the Fourth Circuit's affirmance of the attorneys' fees award. The Fourth Circuit followed settled law, and the law in this area is not the subject of controversy among the circuits. Accordingly, there is no need for this Court to "act now to make the proper rule of law clear for all the Circuits." (Petition at 17.)

A. The Fourth Circuit Applied The Correct Rule Of Law

In reviewing the attorneys' fee award, the Fourth Circuit considered whether Petitioner's FCA claims were "clearly frivolous." That is the standard expressly mandated by the FCA. *See* 31 U.S.C. § 3730(d)(4) ("[T]he court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.").

The Fourth Circuit defined "clearly frivolous" to mean "no reasonable chance of success." That is the definition Petitioner advocates. (Opinion at 40a, Petitioner's Appendix A; Opening Brief at 46.) It is also consistent with the definition other courts have used in analyzing whether FCA claims are "clearly frivolous." *E.g.*, *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004) (stating that the "plaintiff's action must be meritless in the sense that it is groundless or without foundation"); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001) (stating a "claim is

frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument to modify present law"); *United States ex rel. J. Cooper & Assoc., Inc. v. Bernard Hodes Group, Inc.*, 422 F. Supp. 2d 225, 238 (D.D.C. 2006) (stating "A claim is frivolous if it is utterly lacking in legal merit and evidentiary support.").

Reviewing the record through the "no reasonable chance of success" lens, the Fourth Circuit concluded that the district court did not abuse its discretion in finding that Petitioner's "claim that he qualified as a proper relator clearly had no reasonable chance of success." (Opinion at 40a, Petitioner's Appendix A.) Petitioner was not a proper relator because he lacked independent and direct knowledge of any false claims by Respondents. The district court's decision was not an abuse of discretion in these circumstances. *See Daly v. Hill*, 790 F.2d 1071, 1085 (4th Cir. 1986) (recognizing that the appellate court "has a duty to affirm an [attorneys' fees] award which falls within the district court's broad discretion").

B. The Petition Seeks This Court's Review Of Factual Determinations, Which Does Not Merit A Writ Of *Certiorari*

As with his first and second assignments of error, Petitioner's real objection is not with the rule of law applied by the Fourth Circuit in reviewing the attorneys' fee award, but with its factual determinations regarding Petitioner's allegations. The assertion of erroneous factual determinations by

the lower court is insufficient to merit a writ of *certiorari*. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (stating "[w]e do not grant a *certiorari* to review evidence and discuss specific facts"); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981) (dismissing cross petition of writ as improvidently granted where the Court was "presented primarily with a question of fact, which does not merit Court review"); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 537 (1957) (stating "[t]he rule that the Court does not grant *certiorari* to review evidence is a wise rule, indeed indispensable to the work of the Court"). As the Court stated, its review "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) (dismissing writ where it became clear that the only controversy revolved around the sufficiency of the evidence).

The Fourth Circuit's determinations are supported by the record in any event. As observed by both courts below, Petitioner provided no evidentiary support for his allegation that he had direct and independent knowledge that The Cameron Foundation (or any Respondent) submitted a false bill or statement to the Government. (Opinion at 32a, Petitioner's Appendix A; Opinion at 78a, Petitioner's Appendix C.) Indeed, Petitioner could not specify even a single false bill or statement that any Respondent submitted, whether based on direct or indirect knowledge. When given the opportunity to proffer such evidence at the hearing

on the motions to dismiss—his suit hanging in the balance—Petitioner admitted he could not.

If anything, Petitioner's evidence affirmatively demonstrated that his allegations of direct and independent knowledge were clearly frivolous. For instance, Petitioner admitted that he ceased practicing medicine at SRMC in 2003. Petitioner's contention that he had direct and independent knowledge of allegedly false claim submittals at SRMC "through March of 2005," was thus patently false. (Opinion at 31a, Petitioner's Appendix A); *Rockwell*, 549 U.S. at 475-76 (holding relator incapable of having direct and independent knowledge of facts that transpired after he left the defendant's employ).

In sum, the lower courts' frivolity findings are not clearly erroneous given this record. They present no grounds worthy of a writ of *certiorari*. *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944) (stating that it "must be a strong case in which this court will set aside these concurrent findings of two courts"). *See also* Sup. Ct. R. 10 (stating that where the "asserted error consists of erroneous factual finding or misapplication of a properly stated rule of law," the Court will rarely grant a writ of *certiorari*).

CONCLUSION

For the forgoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted.

J. William Boland
Counsel of Record
E. Duncan Getchell, Jr.
Jeremy S. Byrum
Nathan A. Kottkamp
MCGUIREWOODS LLP
901 East Cary Street
Richmond, VA 23219
(804) 775-1000

Counsel for Respondent Columbia/HCA John Randolph, Inc.

Michael R. Shebelskie
Counsel of Record
Rita Davis
HUNTON & WILLIAMS, LLP
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

Counsel for Respondents Petersburg Hospital Company, LLC & The Cameron Foundation

Martin A. Donlan, Jr.
Counsel of Record
W. Benjamin Pace
WILLIAMS MULLEN
1021 East Cary Street
P. O. Box 1320
Richmond, VA 23218-1320
(804) 643-1991

Counsel for Respondents Gopinath Jadhav, M.D. & Southside Gastroenterology Associates, Ltd.